No. 01-131

Supreme Court, U.S.
FILED
JAN 17 2002
CLERK

In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, and NANCY SANDINE,

Petitioners,

v.

JO ANNE B. BARNHART, Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

On the brief:

JOEL F FRIEDMAN
Phoenix, Arizona

PROF. ROBERT E. RAINS
Carlisle, Pennsylvania

ERIC BUCHANAN
Chattanooga, Tennessee

LAWRENCE D. ROHLFING
Santa Fe Springs, California

NANCY G. SHOR
NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
6 Prospect Street
Midland Park, New Jersey 07432
(201) 444-1415, (800) 431-2804

KIRK B. ROOSE
ROOSE & BIRMINGHAM L.L.C.
5 South Main Street
Suite 301
Oberlin, Ohio 44074
(440) 774-7700
Counsel of Record for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* NOSSCR 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT 5

I. The "lodestar" method is inconsistent with § 406(b) because it exalts the time spent over the result achieved, limiting the fee that the client can offer an attorney to an hourly wage with possible bonuses; there is no evidence that Congress intended such a result..... 5

A. The lodestar method was developed for setting fees that losing parties are forced to pay opposing counsel under fee-shifting legislation, and is not appropriate for setting fees that clients may offer their own attorneys to take their meritorious Social Security claims to court..... 8

B. The version of the lodestar method that the Ninth Circuit uses to set fees under § 406(b) is particularly defective..... 10

1. The Ninth Circuit's decisions are ambiguous about whether district courts, when setting the fees that clients may pay their attorneys in Social Security cases, are required to account for the contingency of the fee in all cases or only in cases that are especially risky 11

2. The Ninth Circuit erroneously permits a district court to limit fees to non-contingent hourly rates, despite the legal requirement that the fee be contingent, without articulating any reason for using those lower rates in the individual case..... 12

TABLE OF CONTENTS – Continued

Page

II. *Amicus Curiae* NOSSCR recommends two alternatives to the lodestar method that are more consistent with § 406(b): the "25-percent benchmark" method (otherwise known as the "contingency" method) and a "discretionary multi-factor analysis" approach 13

A. The "25-percent benchmark" method adopted by three circuits, which uses 25 percent of the past-due benefits as a starting point in setting the fee, is more consistent with § 406(b) than the lodestar method because it honors Congress' choice of contingent fees over non-contingent, hourly-rate fees 13

1. Congress found contingent fees to be so appropriate for Social Security claims in federal court that it made contingent fees the *only* permissible fees 14

2. Twenty-five percent is a useful and time-honored benchmark for reasonable contingent fees in other areas of law, including Social Security claims at the agency level 16

B. In the alternative, a "discretionary multi-factor analysis," which preserves the district court's discretion to weigh all relevant factors, is consistent with Congress' grant of broad discretion to the district court in § 406(b), is used by state bars to oversee the reasonableness of the fees that attorneys charge their clients, and was used prior to the circuits adopting methods that elevated particular factors 18

CONCLUSION 22

STATUTORY APPENDIX.....App. 1

TABLE OF AUTHORITIES

Page

CASES

Allen v. Shalala, 48 F.3d 456 (9th Cir. 1995) 11

Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980) 19

Gisbrecht v. Apfel, 238 F.3d 1196 (9th Cir. 2000) ...11, 12

Hayes v. Secretary of HHS, 923 F.2d 418 (6th Cir. 1990) 14

Hutchinson v. Bowen, 676 F. Supp. 72 (D. N.J. 1988) 15

In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998) 18

In re Washington Public Power Supply System Securities Litigation, 19 F.3d 1291 (9th Cir. 1994)..... 21

Kay v. Apfel, 176 F.3d 1322 (11th Cir. 1999)..... 12

Mashburn v. National Health Care, Inc., 684 F. Supp. 679 (M.D. Ala. 1988)..... 17

McKittrick v. Gardner, 378 F.2d 872 (4th Cir. 1967) 20

Meshel v. Nutri/System, Inc., 102 F.R.D. 135 (E.D. Pa. 1984) 18

Pierce v. Underwood, 487 U.S. 552 (1988) 5, 19

Straw v. Bowen, 866 F.2d 1167 (9th Cir. 1989)..... 12

Venegas v. Mitchell, 495 U.S. 82 (1990) 9

Wells v. Bowen, 907 F.2d 367 (2d Cir. 1990) 14

Widrig v. Apfel, 140 F.3d 1207 (9th Cir. 1998) 12, 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 2412(d) 9

28 U.S.C. § 2678 10

33 U.S.C. §§ 928(a), (e) 10

38 U.S.C. § 3404(c)(2) 9

42 U.S.C. § 405(g) 1

42 U.S.C. §§ 406(a)(1), (a)(2) 16

42 U.S.C. § 406(a)(4) 16

42 U.S.C. § 406(b) ..... *passim*

42 U.S.C. § 406(b)(1) 5, 6, 7, 9, 15, 16

42 U.S.C. § 406(b)(2) 5, 6, 15

45 U.S.C. § 355(i) 10

MISCELLANEOUS

Richard A. Posner, *Economic Analysis of the Law* (5th ed. 1998), at § 21.9 6

American Bar Association, Formal Opinion 94-389 (1994) 14

John Coffee, "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions," 86 Colum. L. Rev. 669, 724-25 (1986) 18

Alba Conte, Attorney Fee Awards (2d ed. 1993), at § 1.08 6

TABLE OF AUTHORITIES – Continued

Page

Model Code of Professional Responsibility DR 2-106 20

Model Rules of Professional Conduct Rule 1.5 20

INTEREST OF *AMICUS CURIAE* NOSSCR[1]

The National Organization of Social Security Claimants' Representatives ("NOSSCR") is a non-profit corporation. NOSSCR has filed *amicus* briefs in several prior cases to assist the Court in our area of law, presenting the viewpoints of our members and their clients. While most of our members are attorneys in private practice, others work in programs that provide free legal services to the poor. Our members include attorneys from all circuits.

Our members regularly represent people who claim benefits in administrative proceedings before the Social Security Administration. The Social Security system of procedures, rules, and entitlements is complex, and many people with claims find they need someone to represent them. Most contested claims are about the issue of disability, but some are about retirement, insurance coverage, financial eligibility, family relationships, procedures, or other issues.

If a claim is denied at all four administrative levels, our members in some cases file actions in federal court against the Commissioner of Social Security ("the agency"), appealing the final administrative denials. Such civil actions are filed under the judicial review section of the Social Security Act, 42 U.S.C. § 405(g). In the vast majority of cases that our private-attorney members file

---

[1] The parties have consented to the filing of this *amicus* brief in support of petitioners. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

in court, the claimants have entered into fee agreements specifying that the fee will be 25 percent of any past-due benefits to which the claimant becomes entitled.

When the civil actions lead to awards of benefits, our members may file motions with the district court under 42 U.S.C. § 406(b) for approval of the fees for representation in court. The rules that the courts use in deciding whether to approve the requested fees are important, because they affect the availability of our members to represent people who have meritorious claims.

We present to the Court the interests both of our members and their clients. Our members need fees to be sufficient to permit them to represent or continue to represent people who need judicial review.

Thousands of claimants depend on the courts for vindication of their Social Security claims each year. It is in their interests to be able to offer fees large enough to attract able attorneys to take their case to federal court. In NOSSCR's experience, after claimants win benefits they are satisfied to see their attorneys be paid the intended one-fourth of past-due benefits. In fact, some of our members' clients express frustration if the court will not allow them to pay their attorneys the promised amount.

This fee litigation, like most under § 406(b), did not arise because the clients objected to paying the agreed fees. It was the agency, in a swift turnabout after trying in court to prevent the claimants from receiving any benefits at all, that raised objections to the payment of the requested fees from those benefits.

SUMMARY OF ARGUMENT

The "lodestar" method, which the loser in this litigation wants to use to impose a limit on what the winners can pay their attorneys, is inconsistent with § 406(b) because it favors the time clock over the bottom line – it limits the fee that the client can offer an attorney to an hourly wage with possible bonuses. There is no evidence that Congress intended to restrict claimants to paying their attorneys by the hour, instead of by the job. The lodestar method was developed for setting fees that losing parties are forced to pay opposing counsel under fee-shifting legislation, and is not appropriate for setting fees that clients may offer their own attorneys to take their meritorious Social Security claims to court.

The version of the lodestar method that the Ninth Circuit uses to set fees under § 406(b) is particularly flawed in two respects. First, the Ninth Circuit's decisions are ambiguous about whether district courts, when setting the fees that clients may pay their attorneys, are required to adjust for the contingency of the fee in all cases or only in cases that are especially risky. Second, despite the legal requirement that the fee be contingent, the Ninth Circuit unwisely permits a district court to limit fees to non-contingent hourly rates without articulating any reason for using those lower rates in a specific case.

Instead of the lodestar method, we recommend two alternatives that are more consistent with § 406(b): the "25-percent benchmark" method or a "discretionary multi-factor analysis" approach.

The "25-percent benchmark" method, otherwise known as the "contingency" method, has been adopted by the Second, Sixth, and Seventh Circuits. It uses 25 percent of the past-due benefits as a starting point in setting the fee. This method is more consistent with § 406(b) than the lodestar method, because it honors Congress' choice of contingent fees over non-contingent, hourly-rate fees. Congress found contingent fees to be so appropriate for Social Security claims in federal court that it made contingent fees the *only* permissible fees. The specific figure of 25 percent is a reasonable place to start the analysis. It is a useful and time-honored benchmark for reasonable contingent fees in Social Security cases at the agency level and in common-fund litigation.

If the Court prefers not to adopt the "25-percent benchmark" method, we recommend an approach that we term the "discretionary multi-factor analysis" approach. That approach asks the district court to weigh all of the relevant factors according to the circumstances of the individual case, without giving pre-determined priority to any one factor. A "discretionary multi-factor analysis" approach is more consistent than other tests with Congress' grant of broad discretion to the district courts in § 406(b). The test is used by state bars to evaluate the reasonableness of the fees that attorneys charge their clients. It was used by the courts before the circuits adopted methods that required district courts to elevate the importance of particular factors.

ARGUMENT

I. The "lodestar" method is inconsistent with § 406(b) because it exalts the time spent over the result achieved, limiting the fee that the client can offer an attorney to an hourly wage with possible bonuses; there is no evidence that Congress intended such a result.

In interpreting fee-authorizing statutes, the Court has closely analyzed the text of the provision to discern Congress' intention regarding the breadth of the district court's discretion and the tests it should employ. *See, e.g., Pierce v. Underwood*, 487 U.S. 552 (1988).

The provision to be interpreted by the Court in this case reads:

> Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow . . . a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment. . . .

42 U.S.C. § 406(b)(1). The fee set by the court is the only fee the attorney is permitted to receive from the claimant. 42 U.S.C. § 406(b)(2).

The lodestar method limits attorney fees by directing the district court to put a cap on the hourly rates that the successful claimant can pay the attorney. Contingency and other factors may be considered and may increase or "enhance" the lodestar rate, but essentially the attorney is put on an hourly wage, albeit with possible bonuses.

In reality, contingent fees are higher than non-contingent. "A contingent fee must be higher than a fee for the same legal services paid as they are performed."[2]

If Congress had wanted district courts to limit the hourly rates that claimants could offer attorneys, § 406(b)(1) would have been worded differently when it was enacted in 1965. If Congress had intended the lodestar result, § 406(b)(1) could easily have instructed district courts to determine a "fee at a reasonable hourly rate," instead of a "reasonable fee." A "reasonable fee" in 1965 had no connotation of the later lodestar analysis. The hourly rate is not mentioned or even implied anywhere in the Social Security Act.

To the contrary, the language chosen by Congress, "a reasonable fee for such *representation*," shows that Congress wanted the fee to be reasonable in relation to the representation taken as a whole, not focusing particularly on hours of service. The term "representation" refers to all aspects of the attorney-client relationship, not just the hours spent by the attorney pursuant to that relationship. By contrast, in § 406(b)(2), outside of the reference to a reasonable fee, Congress used the phrase "services rendered." That phrase, if it had been used in the § 406(b)(1) reasonableness test in place of "representation," would have been more susceptible to the interpretation that services should be evaluated at an hourly rate.

---

[2] Richard A. Posner, *Economic Analysis of the Law* (5th ed. 1998), at § 21.9; see also, Alba Conte, Attorney Fee Awards (2d ed. 1993), at § 1.08 ("It is axiomatic that attorneys who work on a contingent fee basis must charge a higher fee than those who work on a noncontingent fee basis").

Congress stated in § 406(b)(1) that the fee which could be allowed was 25 percent "of the past-due benefits to which the claimant is entitled by reason of such *judgment*." This eliminated any argument that the court should count only those past-due benefits the attorney can prove the claimant became entitled to as a result of the attorney's *services*. Congress crafted the 25-percent clause to focus exclusively on the bottom line, the favorable judgment, rather than how the attorney helped the client get there. Congress' focus on the judgment in the 25-percent limitation, without reference to the attorney's time, implies that Congress did not intend to emphasize hours of service and hourly rates in 42 U.S.C. § 406(b)(1).

The lodestar method's initial focus on hours and rates also is inconsistent with the order in which Congress placed the phrases in § 406(b)(1). The sentence begins: "Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney . . . . " Thus the district court looks at the judgment favorable to the claimant, the satisfaction of the contingency, and the result of the representation, before it can move ahead to the second part of the sentence, the determination of the reasonable fee. The lodestar method violates a common-sense left-to-right reading of § 406(b)(1) by asking the district court to forget about the judgment, the favorable result, and the satisfaction of the contingency, until *after* it analyzes the hours and hourly rates.

The difference in nature between the 25-percent-contingency test and the "reasonable fee" test in § 406(b)(1) suggests that Congress knew that the 25-

percent-contingency test would be applied before reaching the "reasonable fee" test. The 25-percent-of-past-due-benefits test is a straightforward arithmetical test that measures results. The "reasonable fee" test is a "softer" discretionary test. Congress must have expected that the court would look first at how much the claimant won, to see if a fee request complied with the easier test (25 percent), before proceeding to the discretionary test ("reasonable") that requires weighing more factors. Common sense suggests that the court would then look at the second test ("reasonable") by beginning with the factors already considered in the 25-percent test, not by forgetting about contingent results, changing focus to hours and hourly rates, and only later giving another passing glance to contingent results in order to adjust the "lodestar."

A. The lodestar method was developed for setting fees that losing parties are forced to pay opposing counsel under fee-shifting legislation, and is not appropriate for setting fees that clients may offer their own attorneys to take their meritorious Social Security claims to court.

The lodestar method wastes time. It generates litigation like this. It requires the district court to start from zero in setting a reasonable fee, instead of starting from the fee that the client offered to attract the attorney. It causes litigation over its key factors: the hourly rate, the number of hours, and the availability of enhancements. This type of detailed litigation may be necessary between adverse parties under fee-shifting statutes, but not between satisfied clients and their attorneys.

Petitioners' brief shows in detail that the lodestar method arose more than a decade after § 406(b)(1) was enacted. It began with fee-shifting legislation designed to force losing parties to pay "reasonable" attorney fees to the winning party. This Court has carefully distinguished fees that may be charged to losing parties and fees that may be charged to the winning party by agreement with that party's own attorney. *Venegas v. Mitchell*, 495 U.S. 82 (1990) (fees available from losing parties under fee-shifting statutes do not prevent enforcement of winning parties' agreements to pay their attorneys larger fees).

Congress also has distinguished between statutes that shift fees from losers to winners and statutes regulating the fees that winners can pay their own attorneys. In fee-shifting legislation, Congress has sometimes focused on hourly rates for fees. The Equal Access to Justice Act, 28 U.S.C. § 2412(d), for example, places a specific dollar limit on the hourly attorney rate that can be charged to the losing party. But we know of no federal benefits statutes that place a limit on the hourly rates attorneys can charge their own clients. Some statutes prohibit the attorneys from charging their clients more than a fixed dollar cap,[3] some limit the fee to a percentage of

---

[3] *See, e.g.*, 38 U.S.C. § 3404(c)(2) (fees for certain representation before Veterans' Administration limited to $10).

recovery,[4] some prohibit any fee from the client by limiting the fee to the shifted fee,[5] some require the fee to be approved by the tribunal,[6] and some (like this one) use differing combinations of a "reasonableness" test and a percentage limit. We find none, however, that regulates the hourly rate clients can agree to pay their own attorneys. The lodestar concept of limiting hourly rates, while familiar to Congress in shifting fees to opposing parties, is foreign to Congress in regulating the fees that clients can offer their own attorneys.

B. The version of the lodestar method that the Ninth Circuit uses to set fees under § 406(b) is particularly defective.

In each of the three cases before this Court, the claimant and the attorney had agreed prior to the litigation that the fee would be 25 percent of any past-due benefits that might be won. Such a fee agreement, for the maximum fee allowable under § 406(b), is the customary agreement in this field of law. In all of these cases, the district courts' judgments entitled the claimants to past-due benefits as well as future benefits.

---

[4] *See, e.g.*, 28 U.S.C. § 2678 (fees for representation in a Federal Torts Claim Act case in court limited to 25 percent of judgment).

[5] *See, e.g.*, 33 U.S.C. §§ 928(a), (e) (fees for representation in a Longshore and Harbor Workers' Compensation case limited to the "reasonable" fee assessed against the employer or carrier).

[6] *See, e.g.*, 45 U.S.C. § 355(i) (fees for representation in a Railroad Unemployment Insurance case must be approved by the agency or court).

In each of these three cases, the attorney requested the full 25-percent fee, with two fees in the $7,000 range (Gisbrecht and Miller) and one of about $14,000 (Sandine). In a fourth case that was decided by the Ninth Circuit at the same time, but not accepted by this Court for review, the same attorney had voluntarily lowered his fee request to less than one-third of the 25-percent agreement, or a fee of about $10,000.

Using the Ninth Circuit's "lodestar" method, the district court cut the fees roughly by half in two cases, and by a quarter in the third case, by limiting the two attorneys to hourly rates of $125 and $150. The district courts found that $125 and $150 were reasonable lodestar rates and refused increases based on the contingency of the fees. *Gisbrecht v. Apfel*, 238 F.3d 1196, 1198 (9th Cir. 2000). The Ninth Circuit affirmed the cuts, and refused to require reasons.

1. The Ninth Circuit's decisions are ambiguous about whether district courts, when setting the fees that clients may pay their attorneys, are required to account for the contingency of the fee in all cases or only in cases that are especially risky.

The Ninth Circuit holds that the district court must consider the contingent nature of the fee in every case, as one of 12 *"Kerr"* factors that may "adjust" the lodestar fee. *Gisbrecht v. Apfel, supra*, at 1198, 1199 ("a district court must consider a plaintiff's request to increase a fee on this basis [the contingent-fee agreement]"), citing *Allen v. Shalala*, 48 F.3d 456, 458 (9th Cir. 1995).

But it is unclear whether a district court in the Ninth Circuit is permitted to increase the lodestar fee because of the contingent nature of the fee in a Social Security case of ordinary risk. The case *Straw v. Bowen*, 866 F.2d 1167, 1170 (9th Cir. 1989), is still cited by district courts that refuse to grant any increase in lodestar fees under § 406(b): "There is no evidence that [these] cases were unusually risky." *See, Widrig v. Apfel*, 140 F.3d 1207, 1210 (9th Cir. 1998) (citing *Straw*). The Court at minimum should clarify that claimants in the Ninth Circuit are permitted to offer their attorneys more than a non-contingent hourly rate, even if their cases pose only average risks of loss.

2. The Ninth Circuit erroneously permits a district court to limit fees to non-contingent hourly rates, despite the legal requirement that the fee be contingent, without articulating any reason for using those lower rates in the individual case.

The Ninth Circuit, unlike other "lodestar" circuits,[7] permits the district court to disallow any contingency increase in the lodestar rate without explanation. *Gisbrecht v. Apfel, supra*, at 1198, 1199 ("Although a district court must consider a plaintiff's request to increase a fee [on the basis of the contingent-fee agreement] [citation omitted], a court *'is not required to articulate its reasons'* for

[7] *See, e.g., Kay v. Apfel*, 176 F.3d 1322 (11th Cir. 1999) ("[t]he weight of any adjustments for factors such as a contingency fee agreement should be clearly articulated in the order awarding fees").

accepting or rejecting such a request") (citing *Widrig, supra*, 140 F.3d at 1211) (emphasis supplied). Since contingency is such an important factor in determining the fee, district courts should be required to articulate a good reason if they use the lower, non-contingent lodestar rates in Social Security cases where the fee is required by law to be contingent.

II. *Amicus Curiae* NOSSCR recommends two alternatives to the lodestar method that are more consistent with § 406(b): the "25-percent benchmark" method (otherwise known as the "contingency" method) and the "discretionary multi-factor analysis" approach.

The lodestar method is not what Congress intended, is fashioned for a different purpose, and does not work very well in Social Security cases. Two alternative methods are suggested, each of which is more consistent with the language of § 406(b), is tailored to § 406(b) cases, and will work better than the lodestar method.

A. The "25-percent benchmark" method adopted by three circuits, which uses 25 percent of the past-due benefits as a starting point in setting the fee, is more consistent with § 406(b) than the lodestar method because it honors Congress' choice of contingent fees over non-contingent, hourly-rate fees.

The 25-percent benchmark method uses the 25-percent contingency found in the statute as a benchmark or starting place in setting the fee, so long as that was the fee that the client offered the attorney. This method is

more consistent with § 406(b) than the lodestar method's limitation of hourly rates is, because § 406(b) "establishes a cap on attorney's fees of 25% of the claimant's award, not a cap on the hourly rate." *Hayes v. Secretary of HHS*, 923 F.2d 418, 421 (6th Cir. 1990).

This method minimizes secondary litigation over fees. "In each case where the contingent fee is found to be reasonable, based on a general assessment of the fee in relation to the nature of the litigation, the need for complicated lodestar calculations, expert evidence, and protracted litigation vanishes." The court assuredly does not rubber-stamp the 25-percent amount, but considers whether deductions are appropriate for at least two reasons: "fraud or overreaching in making the agreement," or "the requested amount is so large as to be a windfall to the attorney." *Wells v. Bowen*, 907 F.2d 367, 372 (2d Cir. 1990). This method is consistent with Congress' intent.

1. Congress found contingent fees to be so appropriate for Social Security claims in federal court that it made contingent fees the *only* permissible fees.

Contingent fees are useful and proper in many settings. Although they are prohibited in some defined areas of law such as family law, they are not generally disfavored. They play a valuable role in encouraging attorneys to screen out cases that have little merit, provide the "key to the courthouse" for people without enough money to pay an attorney a non-contingent fee, and are used widely in business settings, as well. American Bar Association, Formal Opinion 94-389 (1994) ("Contingent

Fees") (noting the use of contingent fees in patent litigation, real estate tax appeals, mergers and acquisitions, public offerings, and use by defendants of "reverse contingent fees"). The ABA Opinion notes that "[t]he use of contingent fees in these areas, for plaintiffs and defendants, impecunious and affluent alike, reflects the desire of clients to tie a lawyer's compensation to her performance and to give the lawyer incentives to improve returns to the client. The trend may also reflect a growing dissatisfaction with hourly rate billing."

Regardless of the wisdom of contingent fees in other areas of law, Congress in § 406(b) gave the highest form of endorsement to contingent fees for Social Security court cases – it prohibited any other type of fees.[8] Congress was well aware that contingent fee agreements were going to be used in these cases, and approved.

---

[8] Since § 406(b)(1) on its face applies only where the court renders a judgment favorable to the plaintiff, and the prohibition on other fees in § 406(b)(2) refers to "proceedings before a court to which paragraph (1) of this subsection is applicable," the Court might question whether the claimant could offer the attorney an hourly-rate or flat-amount fee that would be payable if the claim lost in court. One district court allowed that possibility, *Hutchinson v. Bowen*, 676 F. Supp. 72 (D. N.J. 1988). But no other district court case has cited *Hutchinson*, probably because few if any plaintiffs can afford to gamble a fee, plaintiffs would interpret a request for such a non-contingent fee as a signal that the case was weak, attorneys would hesitate to charge a fee of dubious propriety, and the agency apparently believes that such a fee would be illegal. Br. for the Resp't in Opp'n at 12 n.12. Allowing unregulated fees to be paid if the claim lost in court would create a perverse incentive if the fee would be larger in the event that the attorney lost the case.

2. Twenty-five percent is a useful and time-honored benchmark for reasonable contingent fees in other areas of law, including Social Security claims at the agency level.

Congress intended that the limit on contingent fees in these cases would also be a benchmark, a starting place for assessing the reasonableness of requested fees. Section 406(b)(1), as well as limiting the fee, allowed the agency for the first time to pay the amount of the approved fee out of the claimant's past-due benefits directly to the attorney. Because this provision parallels the provision in § 406(a)(4) that allows direct payment of up to 25 percent of past-due benefits as fees for agency-level services, in practice the agency withholds 25 percent of the past-due benefits for possible direct payment of a fee to the attorney, whether the claimant's victory was in court or at the agency level. This withholding of 25 percent of past-due benefits supports the inference that Congress approved the figure of 25 percent as a benchmark for fees.

Twenty-five percent of past-due benefits is also a benchmark for fees at the agency level. An attorney must obtain approval for any fees charged to represent a claimant before the agency. To obtain that approval, the attorney has two options: to file a fee petition for individual consideration by the decisionmaker, or to submit a limited fee agreement that qualifies for virtually automatic approval. The figure of 25 percent appears in both the fee-petition option and the fee-agreement option as a benchmark that, subject to safeguards, defines a reasonable fee. 42 U.S.C. §§ 406(a)(1) (fee petition), (a)(2) (fee agreement).

In the fee-petition option, the 25-percent figure is the largest amount that the agency will pay directly to the attorneys, so it has become a *de facto* limit on most requests.[9] Claimants are further protected against excessive requests because the attorney must file a fee petition with the adjudicator who must fix a "reasonable" fee in each case.

In the fee-agreement option, attorneys can bypass review of their fees by limiting their fee agreements to the lower of 25 percent of past-due benefits or $4,000. The 25-percent fee, up to $4,000, is deemed reasonable and is automatically paid except in the rare case when someone objects. The agency is raising the dollar limit this year from $4,000 to $5,300.

In both the petition and agreement options, 25 percent of past-due benefits is a common starting point that Congress used for determining reasonable fees and shaping the standard fee contracts for most types of Social Security cases.

Twenty-five percent has been used as a benchmark for attorney fees to be paid out of a common fund created by litigation. Fees in common-fund cases vary widely depending on the nature of the claims and litigation. Some courts have concluded that the benchmark percentage for fee awards in many common-fund cases should be about 25 percent. *Mashburn v. National Health Care, Inc.*,

---

[9] The administrative fee-setter, unlike the federal judge, has the authority to approve a fee of more than 25 percent of past-due benefits.

684 F. Supp. 679, 692 (M.D. Ala. 1988); *Meshel v. Nutri/System, Inc.*, 102 F.R.D. 135, 140 (E.D. Pa. 1984).

Courts are moving away from lodestar approaches in common-fund cases and toward percentage-of-recovery awards. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 483-86 (S.D.N.Y. 1998). Moving away from lodestar fee setting is seen as "deregulatory" reform because it relies on incentives rather than costly monitoring. "Ultimately, this 'deregulatory' approach is the only alternative to converting the courts into the equivalent of public utility commissions that oversee the plaintiff's attorney and elaborately fix the attorney's 'fair' return." John Coffee, "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions," 86 Colum. L. Rev. 669, 724-25 (1986).

B. In the alternative, a "discretionary multi-factor analysis," which preserves the district court's discretion to weigh all relevant factors, is consistent with Congress' grant of broad discretion to the district court in § 406(b), is used by state bars to oversee the reasonableness of the fees that attorneys charge their clients, and was used prior to the circuits adopting methods that elevated particular factors.

If the Court prefers not to adopt the "25-percent benchmark" method, it should adopt an approach we will term the "discretionary multi-factor analysis" approach. Under this approach, the district court uses its discretion to weigh the various relevant factors as they appear more or less important in the individual case. This method is

consistent with Congress' intent in § 406(b) to give the district court wide discretion.

Congress' intent to vest broad discretion in the district court is apparent here. The phrase "reasonable fee" connotes discretion. The fee to be set is for the specific "representation," not for this *type* of representation; it contemplates an individualized factual determination about a representation that occurred before the court.

The reasoning in *Pierce v. Underwood*, 487 U.S. 552 (1988), is instructive. Since the area of attorney fees is in the general area of "supervision of litigation," and the district court is in the best position to know the factual circumstances, ordinarily wide latitude would be given to the district court. *Pierce* at 559-60.

Further, there are differences among districts in the type and quality of attorneys available, the strengths and weaknesses of the local administrative decisions under review, and the type and quality of briefing needed by the courts. Because of those local differences, the question of a "reasonable fee" is not amenable to a rule or method, so the weighing of factors is better left to the district court in each individual case. *See Pierce* at 561-62 (citing *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10-11 (1980) ("because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district courts to follow")).

Finally, *Pierce* at 564 rejected the attempts of the opposing parties to substitute tests with slightly different emphases for the one Congress enacted: "We do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it." Here

the lodestar method, binding the district court to emphasize the attorney's hours and hourly rate in every case, is an unwise substitute for the discretion that Congress intended in setting a "reasonable fee."

The "discretionary multi-factor analysis" approach, looking at a list of factors without pre-determined preference for any particular factor, is the traditional test used by state bars to oversee the fees that attorneys may charge their clients. This is a close analogy to courts setting reasonable fees that attorneys can charge their clients. State bars determine the reasonableness of a fee by reviewing a list of factors.[10] Two of the factors are the time and labor required, and whether the fee is fixed or contingent. But there are several other factors on the list, including the novelty and difficulty of the questions involved, the skill required, the customary fees in the area for similar services, the amount involved and the results obtained, time limitations, nature and length of the professional relationship, and the experience, reputation, and ability of the attorney. There is no preference given to any one factor as a matter of law.

Before the circuits began adopting methods that curtailed the discretion of district courts by requiring them to elevate specified factors, many courts used what we are calling here the "discretionary multi-factor analysis." *See, e.g., McKittrick v. Gardner*, 378 F.2d 872, 875-76 (4th Cir. 1967):

---

[10] Model Rules of Professional Conduct Rule 1.5; Model Code of Professional Responsibility DR 2-106 (lists of factors substantially identical in both).

> The judge may be assisted by a statement of the time spent by the lawyer, though such statements must be subordinate to the judge's evaluation of the lawyer's contribution to the decision.
>
> . . .
>
> In each case, therefore, the statute requires the court to fix and determine a reasonable fee. It may approve a fee in accordance with a contingent fee contract within the statutory maximum, if it finds, under all of the circumstances, that the fee is reasonable, and in its consideration of reasonableness it may consider all relevant facts and materials, including the contingency of compensation. We suggest no limitations upon the court's exercise of its discretion. We hold only that its discretion must be exercised in each case, without automatic or unquestioning acceptance of contractual arrangements.

The discretion of district courts is broad in many areas. In common-fund cases involving attorney fees of $100 million, district courts in the Ninth Circuit have discretion as to what method or combination of methods to use in setting a reasonable fee, and most circuits allow their district judges the same discretion. *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994). Why should district judges be given any less discretion in considering whether a $7,000 fee in a Social Security case is reasonable?

CONCLUSION

We request the Court to rule that the "lodestar" method does not apply when district courts under 42 U.S.C. § 406(b) set reasonable fees that successful claimants may pay their own attorneys in Social Security cases, and to rule that Ninth Circuit erred by affirming the fees set by the district courts using the lodestar method. We request the Court to order that these cases be returned to the district courts for fee determinations using the "25-percent benchmark" method, or, in the alternative, a "discretionary multi-factor analysis." If instead the Court upholds the lodestar method, we request that these cases be returned to the district courts for new fee determinations with instructions that fees may be increased due to contingency even in Social Security cases having no unusual risk, and that district courts must articulate reasons if they decline to increase fees due to contingency.

Respectfully submitted,

On the brief:

Joel F Friedman
Phoenix, Arizona

Prof. Robert E. Rains
Carlisle, Pennsylvania

Eric Buchanan
Chattanooga, Tennessee

Lawrence D. Rohlfing
Santa Fe Springs,
California

Nancy G. Shor
National Organization
of Social Security
Claimants' Representatives
6 Prospect Street
Midland Park, New Jersey
07432
(201) 444-1415, (800) 431-2804

Kirk B. Roose
Roose & Birmingham L.L.C.
5 South Main Street
Suite 301
Oberlin, Ohio 44074
(440) 774-7700
Counsel of Record
for Amicus Curiae

STATUTORY APPENDIX

42 U.S.C. § 406(b) Fees for representation before court.

(1)(A) Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

. . .

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.